

meet the minimum requirements for a main studio, MMBI cannot be found to be in past or present violation of § 73.1125.

4. MMBI entered into a network affiliation agreement with Bergen County Community Broadcast Foundation (BCCBF) on October 17, 1994, under which WJUX has since its commencement of operations in October 1994 broadcast Jukebox Radio programming produced by BCCBF and its successor, 103.1 FM, Inc. The affiliation agreement states that “Network will provide MMBI with twenty-four hours of programming on a seven day basis, 365 days a year.” The network furnishes to WJUX both programming and commercial spots within the programming. From the perspective of MMBI and the functions of MMBI's staff and main studio, the affiliation with Jukebox Radio is like a local marketing agreement (LMA), a form of time brokerage. LMAs as a form of broadcast business arrangement have long had the approval of the Commission, subject to compliance with FCC requirements as to licensee control and licensee main studio. *See, e.g., Roy R. Russo, Esq.*, 5 FCC Rcd. 7586 (MMB, 1990); *Joseph A. Belisle, Esq.*, 5 FCC Rcd. 7585 (MMB, 1990). The Commission has never ruled that full time, 24 hour time brokerage is impermissible, *Gisela Huberman, Esq.*, 6 FCC Rcd. 5397 (MMB, 1991) and there is no apparent reason why an affiliation agreement like this should bring a different result.

5. WJUX's staff at the Ferndale studio consists of Eugene Blabey, the WJUX general manager, Carol Montana, the WJUX public affairs director and the general WJUX staff support person, George Spicka, a part-time employee of WJUX, and Charles Martin, a part-time WJUX employee who has filled in for Montana and could fill in for Spicka for certain tasks performed by Spicka.

6. Blabey and Montana testified in this proceeding about their duties for WJUX, as did Weis. It cannot be concluded that the functions performed by Blabey and Montana for WJUX are inconsistent with their designated roles.

7. Blabey's duties are undoubtedly typical for a person serving as general manager of a radio station for which the vast majority of programming and commercial material are furnished to the licensee under contract, whether an LMA or affiliation agreement. Blabey represents WJUX in the Sullivan County community through active involvement in the Chamber of Commerce, the county's Emergency Planning Commission, and other organizations in which both MMBI and the licensee of WVOS are members and/or Blabey is the representative of both licensees. He has suggested to Weis employees for WJUX; all of the employees hired thus far for WJUX, with a single exception, have been recruited or suggested by Blabey and all of Blabey's recommendations have been hired by Weis for MMBI. He answers phone calls for WJUX, goes through mail for WJUX, and handles matters that do not require Weis's attention; matters requiring the owner's attention are forwarded to Weis in New Jersey. When necessary, Blabey handles personnel scheduling matters for WJUX, as he did when Spicka was engaged in connection with FCC inspector Loginow's plan to turn the WJUX transmitter on and off, and when Martin filled in for Montana during her appearance at this hearing. He has undertaken to sell advertising time for WJUX. He arranges for promotional announcements on WJUX, as well as on WVOS, for major county events such as the annual summer air show. He occasionally becomes involved in arranging public service announcements. He supervises Montana and she consults with him on WJUX matters. He

participates in the development of public affairs programs which are furnished to Jukebox Radio for broadcast by WJUX.

8. Montana's duties for WJUX are typical of those of a radio station staff person. Like Blabey, Montana works for both WJUX and WVOS. She picks up the mail for both stations from the post office each morning, sorts and distributes the mail, answers phone calls for WJUX, compiles community bulletin board public service announcements which she sends to Jukebox Radio for inclusion in its program material fed to WJUX for broadcast, directs bills to Blabey or Weis for payment, handles WJUX's petty cash, deals with walk-ins, distributes paychecks, prepared by Weis, to WJUX's staff, and on occasion contacts Jukebox Radio about programming comments (such as a desire for more Perry Como songs) from WJUX listeners.

9. The WJUX Ferndale studio is equipped to produce programming and to cause the broadcast of that programming. The studio leased by MMBI for WJUX is equipped with standard programming equipment (microphone, control board, tape machines, etc.) and has been utilized to produce programming, both programs tape recorded for later broadcast ("People Who Make a Difference") and programs broadcast live (*i.e.*, broadcast simultaneously with production), including EBS (EAN) tests and musical program fill-ins when receipt of Jukebox Radio programming has been interrupted. To put programming from the WJUX studio directly on the air, a switch in the Ferndale studio building some ten feet away from the WJUX studio room proper is thrown.

10. The only testimony alleging either an inability to produce programs in the WJUX Ferndale studio or an inability to cause programming from that studio to be

transmitted by WJUX, without first going to the WJUX transmitter site some miles from the Ferndale studio and making a switch at the transmitter site, was offered by the FCC's Serge Loginow. Contrary testimony was offered by several witnesses (Weis, Blabey, Hurst, Montana, Turro). As to the ability to produce programming in the WJUX studio proper, Loginow acknowledged that, while he saw a normal complement of production equipment there, he did not test the equipment. As for the ability to send programs from that studio to the WJUX transmitter to be broadcast, Loginow's testimony was contradicted by every other witness who addressed the subject. Loginow's testimony may be the result of a misunderstanding on Loginow's part coupled with his failure to follow through on his investigation. Although Loginow testified that he had been told by Blabey that a patch panel switch had to be changed at the WJUX/WVOS-FM transmitter site in order to put the WJUX studio on air, when he later visited that transmitter site in Blabey's company, Loginow neither inspected the site to find the patch panel nor did he ask Blabey to show him how a switch would be made there to put the WJUX studio on air. Blabey testified that if he had referred to a switch at the transmitter in responding to Loginow's questions, the reference was to the switch at the WVOS(AM) transmitter some ten feet from the WJUX studio room proper. Because Loginow did and said nothing at the WJUX/WVOS-FM transmitter site to cause Blabey to think Loginow had misunderstood him, Blabey had no reason to address the subject again. The ability to put the WJUX studio directly on the air by throwing a switch ten feet from the studio room proper has not been shown by the Bureau to not satisfy the Commission's requirement that a main studio have continuous program transmission capability.

11. To the extent it is clarified with respect to Blabey's position as WJUX's general manager that his managerial role cannot be credited because his agreement with MMBI terms him a "consultant," consistent with the form in which his MMBI pay checks are prepared, that argument cannot be persuasive in this FCC proceeding. Weis, MMBI's owner, treats and addresses Blabey as his general manager, not as a consultant, and Montana, in her capacity as WJUX's staff person, recognizes Blabey as her superior, not as a consultant to MMBI. Blabey in fact has functioned and viewed himself as Weis's general manager at WJUX. If the means by which he is paid and the related terminology used in describing his position raise any issue, it is not an issue for the FCC. Blabey undoubtedly provides a full-time management presence as that concept has developed. Jones Eastern of the Outer Banks, Inc., 7 FCC Rcd. 6800 (1992).

12. It might be argued that because Blabey functions also as general manager of WVOS, licensed to a corporation of which he is an officer and principal, he cannot satisfy the requirement that WJUX have a meaningful managerial presence on a full-time basis. Relatedly, it might be argued that a problem under the FCC's cross-interest policy exists.

13. As to the first of these arguments, a Mass Media Bureau ruling of 1994 (KQQK, Inc., 10 FCC Rcd. 132 (MMB, 1995)) indicates that "full time managerial presence" is not equated by the Commission to "full-time and exclusive managerial presence." In KQQK, the licensee responding to the FCC's inquiry claimed as its manager a person who was the president of the licensee of a separately owned radio station from which KQQK rented space. The FCC, having considered KQQK's response, did not find as a matter of settled policy or rule that KQQK's full-time managerial presence could not under any circumstances be

provided by a person who simultaneously ran another radio station in the same building. It found, instead, that KQQK had failed in its particular case to show that the person did, in fact, hold a managerial position.

14. As to the second argument, that with respect to the cross-interest policy, it would urge a result based on an issue that was not designated for hearing. The cross-interest policy is a policy only, it is not a rule, and determinations under the policy depend upon the facts examined in particular cases. No issue was designated in this case to call forth such facts. Moreover, if it were to be found on an examination of all relevant facts that Blabey's roles with WJUX and with WVOS are inconsistent with the cross-interest policy, the remedy would be to require his resignation from WJUX. MMBI would then engage a new general manager. There would be no basis for penalizing MMBI.

15. As to both the first and second arguments, the Commission was fully informed by MMBI of Blabey's and (Montana's) simultaneous relationships with WJUX and WVOS prior to designation for hearing, and ruminated on that information in the HDO. See, HDO at n. 8 and n. 15. The Commission not only did not designate a cross-interest policy issue but, at n. 15, suggested that its only question, "under these circumstances," was whether the presence of Blabey and Montana represented a "meaningful management presence."

16. The Commission's recitation of facts in notes 8 and 15 of the HDO shows that MMBI, through Weis, accurately described the relationships of Blabey and Montana. If the Commission itself could not, as note 15 shows, resolve that these relationships *ipso facto* prevent Blabey from providing the requisite full-time managerial presence for WJUX, then

MMBI and Weis could hardly be expected to have had the foresight to have believed MMBI was providing inadequate staffing of its main studio by hiring Blabey and Montana.

17. In fact, the record shows that Blabey provides exactly the sort of full-time managerial presence the Commission desires, and can and does do so for both WJUX and WVOS. The Commission explained the importance of the meaningful management presence in its Memorandum Opinion and Order on Reconsideration, Amendment of § 73.1125 and 73.1120, 3 FCC Rcd. 5024 (1988), as follows: “A meaningful management and staff presence will help expose stations to community activities, help them identify community needs and interests, and thereby meet their community service requirements.” This is precisely what Blabey, and Montana, do for WJUX.

18. The HDO strongly suggests that the question of whether WJUX has remote control capability at its main studio is a portion of the main studio issue. Analytically, that is a *non sequitur*. The Commission' rule on remote control, § 73.1400, does not require that a station's remote control point be at its main studio. In fact, §73.1400(a)(1)(ii), describing a means of attended operation, permits remote control “at the main studio or other location”. The introductory paragraph of §73.1400 says that at all times a licensee is responsible for assuring operation within tolerances, and that “[a]ny method of complying with applicable tolerances is permissible.” Remote control is only one of several “typical methods of transmission system operation.” *Id.*

19. Nevertheless, the evidence is clear that WJUX may be remotely controlled by telephone from its main studio. Substantial testimony (*e.g.*, Hurst, Weis, Blabey, Montana) supports this conclusion. Only FCC inspector Loginow raised any shadow of a doubt in his

direct testimony, but on cross-examination he admitted: (1) he was told by Turro on April 13 that WJUX could be remotely controlled by telephone dial-up, and (2) he made no inquiry about telephone remote control, after hearing this from Turro, of those present at the WJUX studio. In particular, he did not ask Blabey about telephone remote control. Loginow testified he had asked Blabey if WJUX had “remote control equipment” in its studio, and Blabey said it did not. Blabey acknowledges this exchange may have occurred, and explains that in his mind “remote control equipment” is a reference to a piece of equipment, as stations had in the past, specifically designed for and dedicated to the function of remote control. WJUX did not have such a piece of equipment at its studio.

20. There is, in sum, no credible evidence that WJUX lacks sufficient control capability to comply with § 73.1400 and substantial evidence that it has that capability.

21. MMBI has acknowledged in Mr. Weis's direct testimony that during its first months of operation, until-mid 1995, calls to WJUX's listed local telephone number were apparently uniformly forwarded to Jukebox Radio's Dumont, New Jersey, offices. There is no doubt that MMBI had a local listing for WJUX (then WXTM) available from directory assistance; indeed, Howard Warshaw of Universal obtained the station's telephone number from directory assistance in January 1995. While the rule (§ 73.1125(c)) literally requires only that each station “maintain a local telephone number in its community of license or a toll-free number”, which MMBI did, it is not unreasonable to read the rule to incorporate the unstated need for the telephone number to be answered at the station's main studio during normal business hours. While Blabey testified that WJUX's number was for a line which came to the Ferndale studio, Montana testified that until mid-1995 she had no WJUX telephone at her

desk to answer. Whether the WJUX number could have been answered elsewhere in the Ferndale studio if call forwarding had been suspended, or in fact was ever so answered during any period when call forwarding was suspended, could not be determined from the evidence available at trial.

22. Issue 5 inquires into not only § 73.1125 but also § 73.1120. In its entirety, § 73.1120 says:

Each AM, FM and TV broadcast station will be licensed to the principal community or other political subdivision which it primarily serves. This principal community (city, town or other political subdivision) will be considered to be the geographical station location.

As far as the second of the two sentences of this rule may be pertinent, it is unchallenged in the record that the WJUX public inspection file is maintained, as required, within the village of Monticello. No other physical presence is required in that “geographical station location.”

23. It may be asserted that the first sentence of §73.1120 imposes a requirement different than that of §73.1125. The HDO however, does not treat §73.1120 that way. The rule is referred to only once in the text of the HDO, in the last sentence of par. 15 and, in that context, was treated by the Commission, for this case, as synonymous with §73.1125. Because the HDO serves as MMBI's Bill of Particulars, no more expansive reading of §73.1120 can be employed in deciding this case.

24. Assuming, for the sake of analysis only, that in this case §73.1120's first sentence called for a determination of WJUX's program service to Monticello and the surrounding service area, the record does not support any conclusion of deficiency. The Bureau presented no evidence of a failure of WJUX to meet local needs and interests or to deal

with local issues, and the record shows that the Commission has not received (other than from Universal) any programming-based complaints against WJUX from persons within its service area. Contrarily, the record shows that WJUX regularly broadcasts public service announcements for its service area and broadcasts public affairs programs of interest to its service area, both programs produced in Sullivan County and elsewhere. Moreover, given the proximity of Monticello and Sullivan County to the New York metropolitan area, it could not be inferred that a program apparently designed to be of interest in the New York metropolitan area would not also be of interest in Sullivan County. On this record, no conclusion adverse to MMBI could be made pursuant to §73.1120. See, WHYY, Inc., 93 FCC 2d 1086 (1983) at 1094.

ISSUE 6: CONTROL OF WJUX

25. This issue asks whether MMBI engaged in an unauthorized transfer of control or otherwise abdicated control of WJUX to Turro or an affiliated entity.

26. The record contains no evidence contrary to Weis's claim that he is the sole owner of MMBI, and that Turro has never had any ownership interest in WJUX or any option to acquire any such interest. The Bureau offered no evidence of any secret agreement, written or oral, whereby Weis had agreed with Turro to turn control of WJUX over to Turro.

27. Instead, the Bureau's contention appears to be that the Affiliation Agreement between MMBI and BCCBF pursuant to which WJUX broadcasts programming produced by BCCBF and its successor, 103.1 FM, Inc., entities controlled by Turro, and receives monthly

payments from 103.1 FM, Inc., has itself caused an unauthorized transfer of control.

However, the evidence supports no such conclusion.

28. The Affiliation Agreement was initially a two-page document which provided that BCCBF would provide programming 24 hours per day, 7 days per week, to WJUX and that MMBI would receive specified monthly payments. That two-page agreement also bound the parties to comply with FCC rules and regulations. That commitment to compliance would, of course, include §73.3540(a), which forbids a transfer of control without prior FCC consent. And, so long as MMBI did not seek and obtain FCC consent to transfer control, it was required to retain a licensee's ultimate control; that is, to mandate basic policies pertaining to the fundamental station operations of programming, personnel, and finances. Thus, the initial two-page agreement by its terms required MMBI to retain ultimate licensee control. There is no evidence that it did not.

29. In November 1994, shortly after signing the initial two-page agreement, MMBI and BCCBF, on advice of counsel, agreed to amend the initial agreement. A written amendment reflecting the agreement to amend, two pages in length, was prepared in November 1994, although it went unsigned until July 1995. The amendment contains traditional statements making explicit the licensee's control of the broadcast station and its programming, including features such as the rights to reject and preempt programs supplied by the network.

30. Programming. An arrangement under which a licensee agrees to accept programming and commercial content from a program supplier for the entirety of its broadcast week in return for a contractual payment is permitted by Commission rulings. *See,*

e.g., Choctaw Broadcasting Corporation, 12 FCC Rcd. 8534 (1997); Gisela Huberman, Esq., *supra*. The station licensee must retain ultimate programming control. With respect to programming, that ultimate control may be exercised by consenting to the format of the program supplier. Choctaw, *supra* at 8539. The evidence here is that Weis knew Turro's format before he signed the Affiliation Agreement and believed it would be in the public interest to bring that format to Sullivan County. Moreover, the evidence is that WJUX does not simply broadcast Turro's Jukebox Radio programs all day, every day. Instead, WJUX's staff supplies both public service announcements and public affairs programs not produced by Jukebox Radio for inclusion in the programming broadcast over WJUX. There is no evidence that the programming which MMBI has fashioned for WJUX is not in the public interest and not well accepted in Monticello and Sullivan County.

31. Personnel. There is no evidence that MMBI's employees were selected by Turro or are under Turro's control. The only evidence is that they are under Weis's ultimate control.

32. Finances. MMBI's finances are controlled by Weis, and Weis is responsible for those finances. Turro controls BCCBF and 103.1 FM, Inc., entities which make monthly payments, under the Affiliation Agreement contract, to MMBI. What MMBI does with those payments is up to Weis. He may or may not pay MMBI's bills. If Weis did not, MMBI would, presumably, be hounded by its creditors and, in those instances where Weis has personally guaranteed obligations, Weis would be hounded. Turro, on the other hand, would not be. He has no contractual relationship with MMBI's lessors, employees, utilities or suppliers. If Weis expended more each month operating MMBI and WJUX than MMBI is

entitled to under the Affiliation Agreement (if, for example, Weis gave substantial raises to Blabey, Montana, and Spicka), Turro is under no obligation to make up the deficit. Nothing in the Affiliation Agreement limits the amount of MMBI's expenditures or compels expenditures of any certain amount.

33. Turro's payment of \$40,000.00 to MMBI in October 1994 as an inducement to Weis to enter into the Affiliation Agreement does not alter in any way the conclusion that Weis exercises financial control over MMBI. Weis is very clear that he would not have constructed WJUX without the affiliation with BCCBF; Turro's payment of \$40,000.00 to MMBI solidified, for Weis's benefit, Turro's commitment to the enterprise.

34. Turro has personally guaranteed, to the total amount of \$400,000.00, the obligations of BCCBF to MMBI under the affiliation agreement. Weis asked for the guarantee and Turro gave it. This guarantee, not an extraordinary feature of a contract in this entrepreneurial context, gives Turro no financial control over MMBI. It merely provides Weis with some protection -- limited to Turro's ability to fund the guarantee -- in the event the Jukebox Radio enterprise fails. It does not, however, relieve MMBI or Weis of obligations incurred in the operation of WJUX. Neither Turro nor his entities is an indemnitor or guarantor to third parties of any of MMBI's or WJUX's obligations. There is no doubt that MMBI meets the Commission's test of licensee financial control. Choctaw *supra* at 8541.

35. The Affiliation Agreement contains an indemnification clause for FCC forfeitures. The clause does not undertake to substitute BCCBF as the party from whom the FCC would collect a forfeiture; MMBI would be obligated to the FCC but, in circumstances where the forfeiture was due to Jukebox Radio-originated programming (e.g., an

advertisement for a casino gambling hall), MMBI could seek indemnification from Jukebox Radio for the forfeiture MMBI was compelled to pay to the FCC. This clause does not transfer financial, or programming, control to Turro. In the unlikely event that Jukebox Radio began a regular course of supplying programming in violation of FCC rules (e.g., a morning program routinely indulging in indecent banter), MMBI has every right to preempt the program notwithstanding the indemnity clause.

36. In sum, the evidence of record presents no serious claim that Weis does not control MMBI. The Commission's recent analysis of the elements of ultimate licensee control in Choctaw, *supra* at p. 8541, when applied to this case, compels the conclusion that Weis has maintained control of MMBI and WJUX.

ISSUE 7: MISREPRESENTATION-LACK OF CANDOR

37. Under this issue, it is to be determined whether MMBI “and/or its agents misrepresented and/or lacked candor to the Commission concerning the operation of WJUX”

38. There has been no evidence that employees of MMBI (*i.e.*, Blabey, Montana and Spicka) made misrepresentations to the Commission or were in any way less than candid with the Commission. The misunderstandings between Blabey and FCC inspector Loginow are entirely outside the reach of this issue. Unfortunately, Loginow seems to have asked inaptly worded questions, misunderstood statements made to him, and failed to ask obvious follow-up questions. To the extent he left WJUX on April 13, 1995, with incorrect impressions, no one but Loginow can be faulted.

39. Except for Loginow's encounter with employees of WJUX, it is Weis who has represented MMBI to the FCC. While there may yet be contentions made that WJUX lacked programming capability at its main studio, or lacked remote control capability, or other such matters, and that Weis's representations on those matters to the FCC in his July 27, 1995, response were false, the record evidence would support no such conclusion.

40. The only matter on which Weis made representations to the FCC in MMBI's July 27, 1995, response which have proven to be inaccurate or incomplete is with respect to telephone service to WJUX's main studio. Weis has acknowledged, in his direct testimony, that the answers he provided in 1995 may have caused an erroneous understanding by the reader of his answers. The trial record does not, however, support a conclusion that Weis knew or appreciated that the information he provided to the FCC at that time was false or materially incomplete when he gave it.

41. For purposes of this issue it is important to distinguish between the question of whether MMBI violated §73.1125(c), the main studio telephone requirement which is a component of Issue 5, and whether MMBI knowingly made misrepresentations or lacked candor with respect to its telephone service. A conclusion adverse to MMBI on this component of Issue 5 would not dictate an adverse conclusion on Issue 7.

42. On this issue, as all others, the Bureau has the burden of proof. The Commission's standard on misrepresentation and lack of candor is clear. "Unless there is evidence showing 'deceptive intent,' [the Commission] will not be able to find that misrepresentation or lack of candor has occurred." MCI Telecommunications Corporation,

3 FCC Rcd. 509, 512 (1988), quoting Fox River Broadcasting, Inc., 93 FCC 3d 127, 129 (1983). Here, what evidence exists is not persuasive of an intent by Weis to deceive the Commission.

43. In pre-hearing discovery responses (MMBI's responses to the Bureau's Request for Admissions), MMBI sought, twice, to set the record straight on the WJUX telephone service question. Weis's 1995 response is inaccurate, or incomplete, because it does not reveal that until sometime in 1995 calls placed to WJUX's Sullivan County telephone number were, perhaps uniformly, forwarded to the Dumont, New Jersey, studios of Jukebox Radio. Weis testified that he did not order WJUX's telephone service when the station was being built, but that Turro did. The explanation offered by Weis for Turro's placing the order, and not Weis, is plausible -- Turro's company had an account with the telephone company and MMBI did not. For some reason not apparent from the record, the WJUX local phone number was then set up for call forwarding to the Jukebox Radio studios. Bills from the telephone company were also sent there, and were paid by Turro. In short, until well into 1995, Weis had no direct involvement in or information about WJUX's phone service.

44. The record contains no indication that Blabey was contemporaneously aware of the call forwarding, or that Montana attached any particular significance to it. What Montana did observe was that listeners calling about WJUX called on WVOS's telephone line. Montana did not testify that she had received any complaints about listeners' inability to reach her on a WJUX phone line. (She testified that she had received two complaints -- one about the dearth of Perry Como music on WJUX and one about the local cable system not carrying WJUX). She appears to have had no reason to tell Weis she was not receiving calls for WJUX on a WJUX phone line, and there is no testimony that she -- or anyone else -- did do so. It is

entirely possible that from discussions between Weis and Montana about WJUX matters, Weis had the impression that Montana was talking to WJUX listeners on WJUX's phone line.

45. The record suggests no motivation for anyone deliberately having arranged to have local Sullivan County calls to WJUX forwarded to Dumont, New Jersey. To the contrary, it only added a burden to the staff at Jukebox Radio (which dealt with forwarded calls courteously and helpfully, at least in the cases of Loginow and Warshaw). On the other side of the coin, Montana had been told that among her duties as an employee of WJUX would be answering WJUX's telephone, and Weis appears, from the notations on her pay checks, to have been paying her for, in part, answering WJUX's telephone.

46. The record supports the conclusion that there was a WJUX telephone line to the Ferndale studio building, and there may have been a telephone there as well -- there was at least a modular jack into which a phone would plug -- within a few days of WJUX's initiation of operations. WJUX's local phone number was available from the telephone company's directory assistance service. Outgoing calls on WJUX's local phone were made at least as early as during the billing period ending June 13, 1995. Blabey testified there was a phone line for WJUX in the building, and the NYNEX bill shows charges for a November 2 installation including the modular jack. Thus, although the record supports the conclusion that a large number, perhaps all, of calls to WJUX were forwarded to Dumont until the call forwarding arrangement was terminated, the record is not conclusive on that point.

47. Weis said in response to a question on cross-examination that he learned of the call forwarding in May or June of 1995. If his recollection in December of 1997 about exactly when he learned something two and one-half years earlier is right (in his direct testimony,

given November 10, 1997, Weis testified that he did not recall that he knew of the call forwarding arrangement at the time he answered the Goldstein letter), he may have learned of the call forwarding before the response to the Goldstein letter on July 27, 1995. But what he learned may have seemed inconsequential to him. The record was not elaborated at all after Weis's statement on cross-examination about learning in May or June 1995 of calls being forwarded. He may have learned of it after it was terminated, and may have believed it was of short duration or sporadic. He may have believed that calls were forwarded only if the phone at WJUX went unanswered, and may have intuitively believed this to be not only acceptable but in fact an improvement over an unanswered phone. The record suggests Weis had no reason at all to believe that call forwarding was ever a source of concern to his staff at WJUX or of the listening public in Sullivan County.

48. Weis provided full telephone bills with his July 27, 1995, response to Goldstein's letter. Those bills show a multitude of calls being forwarded to Dumont during each billing period. This was not something Weis was hiding from the Commission.

49. In sum, Weis has admitted that the response he gave to Goldstein's inquiry could have caused an erroneous understanding. That would have been a belief by the reader of the response that the WJUX telephone line was always answered in Ferndale. But Weis provided documents with his response that showed that understanding would indeed be erroneous. There is no evidence that Weis had himself given sufficient review to the telephone billing documents to recognize that the call forwarding was apparently pervasive rather than being merely a device providing an alternative answering point at lunchtime, evenings or weekends for an unanswered phone at the Ferndale studio building. Weis may

not then have recognized that the call forwarding, assuming he knew something of it when he responded to the FCC's inquiry on July 27, 1995, was a material matter. The entirety of his July 27, 1995, response, including his having obtained from Turro and supplied to the FCC detailed phone bills and his explicit acknowledgment that Turro had paid the phone bills for WJUX for a number of months, suggests that Weis was not acting with an intent to deceive.

50. On this issue, the record warrants a conclusion that MMBI has not knowingly misrepresented or lacked candor in its representations to the Commission. Weis could be criticized for failing to assemble and study all of the facts available in July 1995 (probably more than are determinable with certainty today) about WJUX's telephone service in order to be as sure as possible that his response to Goldstein's inquiry was absolutely accurate and fully informative. That failure would not, under the standard established in Fox River, *supra*, constitute a misrepresentation or lack of candor.

ISSUE 8: MMBI'S QUALIFICATIONS TO BE A COMMISSION PERMITTEE

51. The resolution of Issues 5, 6 and 7 favorably to MMBI mandates a determination under Issue 8 that MMBI possesses the requisite qualifications to be the permittee of WJUX and, hence, to receive a grant of its pending application for license to cover its construction permit.

52. In reaching this ultimate conclusion, one may observe that, had the record dictated a different result, the failure of the Commission to adhere to the requirements of §558(c) of the Administrative Procedure Act ("APA"), 5 USC §558(c), would have

compromised the legitimacy of this proceeding and any resulting decision. Weis testified that it was a surprise when the Commission issued to MMBI in April 1997 the Order to Show Cause and Notice of Opportunity for Hearing. MMBI Ex. 1, p. 5. At least one cause of Weis's surprise was the Commission's failure to meet its §558(c) obligations.

53. The requirement of the APA is explicit on this point. Except in cases of wilfullness or those in which public health, interest or safety requires otherwise, the revocation of a license is lawful only if, before agency proceedings for revocation are instituted, the licensee has been given (1) notice by the agency in writing of the facts or conduct which may warrant the action, and (2) an opportunity to demonstrate or achieve compliance with all lawful requirements.

54. Nothing in this case would have supported a determination that §558(c) did not apply. There is no evidence of wilfull (as interpreted relevant to §558(c)) violation of FCC rules by MMBI and no suggestion that the public health, interest or safety justified an exception to the APA's requirements. Goldstein's inquiry letter of June 21, 1995, is not the notice required by the law. In short, there is no basis on which the Commission can claim for this case an exemption from the requirements of §558(c) or claim that it met those requirements. One might speculate that the Commission overlooked its obligations to MMBI in the midst of escalating pressure to initiate action against Gerard Turro and Turro's Jukebox Radio network. This, if it is so, could not justify the omission of the §558(c) notice to MMBI.

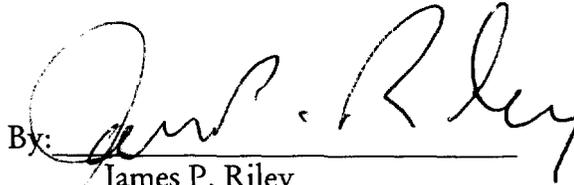
55. While the Commission's failure to act with respect to MMBI as required by §558(c) has injured MMBI by the measure of the cost of this proceeding, it does not, but only

because the issues must on this record be resolved in MMBI's favor and MMBI's license for WJUX must be granted, fatally compromise the proceeding.

Respectfully submitted,

MONTICELLO MOUNTAINTOP
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By:



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March 13, 1998

CERTIFICATE OF SERVICE

I, Deborah N. Lunt, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., do hereby certify that true copies of the foregoing **“Monticello Mountaintop Broadcasting, Inc.’s Proposed Findings of Fact and Conclusions of Law”** was sent this 13th day of March, 1998, by first class mail, postage prepaid, to the following:

The Honorable Arthur I. Steinberg*
Administrative Law Judge
Federal Communications Commission
2000 L Street, NW, Room 228
Washington, DC 20554

Alan Aronowitz, Esquire*
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*By Hand Delivery



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